In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No.

JOHN GONZALES and JOHN CHIEROTTI,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF THE SUPREME COURT OF CALIFORNIA.

The majority opinion of the respondent court was rendered on April 2, 1942 (R. 380), reported in California Advance Reports in 28 A. C. 158.

The minority opinion of respondent court was rendered on the same date and is reported in the same volume at page 166.

(NOTE): All italics appearing in this brief, unless otherwise noted, have been supplied by the writer.

A petition for a rehearing was denied by respondent court on May 2, 1942. (R. 395.)

The judgment of respondent court became final on May 4, 1942, when the remittitur issued out of respondent court to the trial court. (R. 399.)

JURISDICTION.

The jurisdiction of this court is invoked under section 237b of the Judicial Code of the United States.

The grounds on which the jurisdiction of this court is invoked are as follows: that the California Supreme Court denied to each petitioner a right guaranteed by the Federal Constitution, which right was specially set up and claimed before said respondent court and decided against them.

The right contended for is that under the Fourteenth Amendment the state was prohibited from using against each of them, in a criminal trial, evidence acquired by state officers as the result of an unlawful search and seizure of the premises of petitioner Chierotti. Under applicable decisions of this court the right to be secure from unreasonable search and seizure and from the use by a state of evidence so acquired is a fundamental principle of liberty and justice lying at the base of our civil and political institutions. Other applicable decisions of this court hold that such a fundamental right is protected from state action by the due process clause of the Fourteenth Amendment and that a conviction procured by

the use of evidence so acquired by a state is void, as lacking the essential elements of due process, and is subject to review, on certiorari, by this court.

The cases sustaining these propositions are:

Brown v. Mississippi, 297 U. S. 278, 80 L. ed. 682;

Powell v. Alabama, 287 U. S. 45, 77 L. ed. 158;

Chambers v. Florida, 309 U. S. 227, 84 L. ed. 716;

Lisenba v. California, 62 Sup. Ct. 280, L. ed. Advs. Ops. Vol. 86, p. 179.

In each of the foregoing cases this court granted certiorari to review a conviction in a state court, where the petitioner had set up and claimed a constitutional right based upon the state denying to him a fundamental principle of liberty and justice. This court exercised its jurisdiction on the ground that such fundamental principle was guaranteed by the due process of law clause of the Fourteenth Amendment.

STATEMENTS REQUIRED BY RULES 12 AND 38 OF THE SUPREME COURT.

In the petition for the writ filed herein by petitioners there has been set forth in detail all of the statements required by rules 12 and 38 of this court. Said statements are hereby specially referred to and made a part of this brief and will be found in the petition under the headings and at the pages here designated, viz.:

(a) Jurisdiction of the court, *supra,* page 8.

(b) Cases sustaining jurisdiction, *supra,* page 9.

(c) Decision and judgment of the California Supreme Court, *supra,* page 9.

(d) Stage and proceedings in court of first instance at which and the manner in which the federal questions sought to be reviewed were raised, *supra,* page 10.

(e) Time and manner in which federal questions were raised in the Supreme Court of California and that court's action thereon, *supra,* page 24.

(f) Grounds upon which it is contended that the questions involved are substantial, *supra,* page 28.

STATEMENT OF FACTS.

A statement of the case setting forth all that is material to a consideration of the questions presented, with appropriate page references to the record, has been set forth in the preceding petition under the heading "Statement of the Case", *supra,* pages 2 to 7, and under the heading "The Stage in the Proceedings in the Court of First Instance at Which and the Manner in Which the Federal Questions Were Raised", *supra,* pages 10 to 24.

The facts, so set forth in detail in the petition, have been correctly summarized in the majority opinion of respondent court as follows:

> "On June 17, 1940, an indictment was filed charging defendants Gonzales and Chierotti with

having conspired together on May 25, 1940, to commit grand theft by fraudulent representations to Secundo Valenzano regarding a machine that purportedly could reproduce United States currency with the use of certain chemicals. The evidence showed that defendant Gonzales, after striking up an acquaintance with Secundo Valenzano, told Valenzano that a rich man had the machine, that real currency was necessary in making the reproductions, and that he would surreptitiously get possession of the machine and bring it to Valenzano's saloon. He brought the machine there, put some real bills into it, used the chemicals, and when the machine was opened, there were two bills for each one originally inserted. Thereupon Gonzales told Valenzano that if he could get several thousand dollars in new bills, equal to an amount to be furnished by Gonzales, each could double his money by using the machine. Valenzano put up no money but notified the police who arrested both Gonzales and Chierotti.

Valenzano was the only witness who testified to the foregoing events. Police Officer Iredale testified that on June 6, 1940, he and Police Officer Linss, without any warrant, authority, or permission, entered the apartment of defendant Chierotti in the latter's absence and took therefrom a black case containing not only bottles of liquid but a machine, subsequently identified by Valenzano as that used by Gonzales. Chierotti and Gonzales objected to any testimony by Officer Iredale regarding the entry and search of Chierotti's apartment and the seizure of the case and contents, as well as to the introduction and use of the latter as evidence, on the ground that

> the entry, search, seizure, and use of the property violated the rights guaranteed by Chierotti by the Fourteenth Amendment to the Constitution of the United States, and the search and seizure and due process clauses of the Constitution of California. (Cal. Const. Art. I, secs. 19, 13.)" (R. 380-1.)
>
> "Many months before the trial Chierotti filed a written motion for an order directing the return to him of the case and contents, and the exclusion from evidence, not only of this property, but of any testimony of the officers regarding the search and seizure or based on information acquired as a result thereof. The motion was denied." (R. 382.)

The foregoing motion was supported by the affidavit of Chierotti, both of which specially invoked the due process of law clause of the Fourteenth Amendment. The written motion will be found set forth in the petition, *supra,* page 10, and the supporting affidavit will be found therein, *supra,* page 14. Constantly and throughout the trial, all evidence relative to the unlawful search and seizure was consistently objected to by each petitioner, as was the introduction in evidence of the case and its contents so taken by state officers from Chierotti's apartment, on the grounds that the use of such evidence was in violation of the due process clause of the Fourteenth Amendment. Each of these objections was overruled by the trial court. The portions of the record showing the testimony objected to, the grounds of the objection and the court's ruling thereon are set forth in the foregoing petition at pages 16 to 23.

Before the California Supreme Court the convictions were challenged on the ground that they lacked the essential elements of due process of law in that the Fourteenth Amendment prohibited the state from using evidence against either of the petitioners acquired as the result of the unlawful search of Chierotti's apartment and the seizure of the physical evidence therein. The Supreme Court of California denied these constitutional rights.

SPECIFICATION OF ERRORS.

1. Respondent court erred in holding that the use of evidence, against a defendant in a criminal trial, over his timely objection, acquired by the state conducting an unlawful and unreasonable search of said defendant's home, was not prohibited by the due process clause of the Fourteenth Amendment.

2. Respondent court erred in holding that a defendant in a criminal case was not entitled to have his guilt or innocence established without use by the state of evidence acquired by it as the result of an unlawful search of defendant's home and the seizure of physical property therein and that the use of evidence so acquired by the state was not a denial of due process of law.

3. That respondent court erred in holding that the conviction of each petitioner herein was not lacking in the essential elements of due process of law, even though such conviction was based upon evidence ac-

quired by the state in conducting an unlawful and unreasonable search of petitioner Chierotti's home and used over his seasonable objection.

ARGUMENT.

1. STATEMENT OF THE QUESTION INVOLVED AND THE UNDERLYING FACTS.

The record discloses that the entry into the home of Chierotti and the following search and seizure therein by officers of the State of California were unreasonable and unlawful. This appears from the stipulations entered into, approved by the trial court, during the trial of the action (R. 126-128), and also from the motion made by Chierotti for the return of the property and to suppress and exclude all evidence acquired by such unreasonable search and seizure, the State having failed in any manner to deny and controvert the facts set forth in the supporting affidavit filed by Chierotti. Under such circumstances the only question involved is whether these admitted facts establish a right protected by the Fourteenth Amendment. (*Hill v. Texas,* decided June 1, 1942, L. ed. Adv. Ops. Vol. 86, 1090, 1091.)

The petitioners did not wait until the time of trial to urge objections against the use by the State of such illegally acquired evidence. Six months before the trial petitioner Chierotti moved the court for an order directing the return to him of such property and suppressing and excluding the same from evidence to-

gether with all evidence and testimony relating to such illegal search and seizure.

The constitutional questions involved really resolve themselves into one pertinent query, to wit: Is not the right to be secure from unreasonable search and seizure by state officers such a fundamental principle of liberty and justice as to be included within the due process clause of the Fourteenth Amendment, and, if so, does not such right extend to prohibiting the State from using evidence so acquired against the person from whom it was taken?

Phrased differently and based upon the language used in this court in *Chambers v. Florida, supra,* the question involved is as follows: Petitioners having seasonably asserted the right under the Federal Constitution to have their guilt or innocence determined without reliance upon evidence obtained by the State by means proscribed by the due process clause of the Fourteenth Amendment, is not each of their convictions void where the State used such evidence and authorized the jury to determine the question of guilt or innocence by considering such evidence?

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2. **ANY RIGHT WHICH IS A FUNDAMENTAL PRINCIPLE OF LIBERTY AND JUSTICE IS PROTECTED FROM STATE ACTION BY THE FOURTEENTH AMENDMENT.**

This court has consistently held that any right which is a fundamental principle of liberty and justice is protected by the due process clause of the

Fourteenth Amendment. This holding has been made whether or not such right is set forth in any of the first eight amendments to the Constitution; but the fact that such right is included in one of said amendments adds greater force to the contention that it is a fundamental principle of liberty and justice.

We here call attention to the leading cases which have announced the foregoing doctrine.

In *Powell v. Alabama,* 287 U. S. 45, 77 L. ed. 158, certain negroes had been convicted in the State of Alabama of the crime of rape. Certiorari was granted by the Supreme Court of the United States to review the convictions *solely on the ground that the defendant Powell had not been allowed to be represented by counsel at the trial.* The contention was raised that the right to have counsel was contained in the Sixth Amendment to the Federal Constitution which did not operate upon the states and therefore did not fall within the due process clause of the Fourteenth Amendment. This court held to the contrary and in doing so announced that it was the duty of the court to decide "whether the denial of the assistance of counsel contravenes the due process clause of the Fourteenth Amendment of the Federal Constitution." (p. 60.) This court then, at page 67, stated:

> *"The fact that the right involved is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'* (Hebert v. Louisiana, 272 U. S. 312, 316, 71 L. ed. 270, 272, 48 A.L.R. 1102,

47 S. Ct. 103), *is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process clause of the Fourteenth Amendment, although it be specifically dealt with in another part of the federal Constitution.* Evidently this court, in the later cases enumerated, regarded the rights there under consideration as of this fundamental character. That some such distinction must be observed is foreshadowed in Twining v. New Jersey, 211 U. S. 78, 99, 53 L. ed. 97, 106, 29 S. Ct. 14, where Mr. Justice Moody, speaking for the court, said that '* * * *it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action because a denial of them would be a denial of due process of law.* Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 S. Ct. 581. *If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.'* While the question has never been categorically determined by this court, a consideration of the nature of the right and a review of the expressions of this and other courts, make it clear that the right to the aid of counsel is of this fundamental character."

In *Mooney v. Holohan,* 294 U. S. 103, 79 L. ed. 791, our State Attorney General contended that a deprivation of due process could not result from any act of a prosecuting attorney, such as the introduction of known perjured testimony. The Supreme Court held against this contention and said:

"Without attempting at this time to deal with the question at length, we deem it sufficient for the present purpose to say that we are unable to approve this narrow view of the requirement of due process. *That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions.* Hebert v. Louisiana, 272 U. S. 312, 316, 317, 71 L. ed. 270, 273, 47 S. Ct. 103, 48 A.L.R. 1102. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. *Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.*"

In *Brown v. Mississippi,* 297 U. S. 278, 80 L. ed. 682, three negroes were convicted of murder in the courts of the State of Mississippi. The only evidence connecting the defendants with the crime were confessions obtained from the defendants by means of force and torture. The state supreme court upheld the convictions on the ground that immunity from self-incrimination was not essential to due process of law and that the admission of the confessions was mere error in the trial of the cause and not the violation of a constitutional right. The Supreme Court of the United States granted a writ of certiorari and

reversed the convictions on the ground that the use of such evidence violated the due process clause of the Fourteenth Amendment.

When the matter was before this court the State of Mississippi contended that the extortion of a confession, while it might constitute self-incrimination, did not violate a Federal constitutional right. The Supreme Court disposed of this contention as follows:

> "The State stresses the statement in Twining v. New Jersey, 211 U. S. 78, 114, 53 L. ed. 97, 112, 29 S. Ct. 14, that 'exemption from compulsory self-incrimination in the courts of the States is not secured by any part of the Federal Constitution,' and the statement in Snyder v. Massachusetts, 291 U. S. 97, 105, 78 L. ed. 674, 677, 54 S. Ct. 330, 90 A.L.R. 575, that 'the privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the State'. But the question of the right of the State to withdraw the privilege against self-incrimination is not here involved. *The compulsion to which the quoted statements refer is that of the processes of justice by which the accused may be called as a witness and required to testify. Compulsion by torture to extort a confession is a different matter.*"

It will be noted that this court held the right of a State to compel self-incrimination was limited to the right of a State, by statutory sanction, to call an accused as a witness and require him to testify; *that to compel him to give evidence against himself other than in a mode sanctioned by law and justice fell within the condemnation of the Constitution.*

In the case at bar, the procuring of evidence against petitioner in a manner directly condemned by the Constitution, is the equivalent of procuring such evidence in a manner not sanctioned by law.

In *Brown v. Mississippi,* supra, this court announced the limitations upon a State's power to regulate the procedure of its courts as follows:

> "The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental'."

The Supreme Court, after discussing the case of *Powell v. Alabama, supra,* and *Mooney v. Holohan, supra,* then stated:

> "And the trial equally is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence. *The due process clause requires 'that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'.*"

Following which the Supreme Court reversed the convictions on the ground that defendants had been deprived of due process of law and closed their opinion with the following language:

> "In the instant case, the trial court was fully advised by the undisputed evidence of the way in which the confessions had been procured. The trial court knew that there was no other evidence

upon which conviction and sentence could be based. Yet it proceeded to permit conviction and to pronounce sentence. *The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner.* Mooney v. Holohan, 294 U. S. 103, 79 L. ed. 791, 55 S. Ct. 340, 98 A.L.R. 406, supra. *It was challenged before the Supreme Court of the State by the express invocation of the Fourteenth Amendment.* That court entertained the challenge, considered the federal question thus presented, but declined to enforce petitioners' constitutional right. *The court thus denied a federal right fully established and specially set up and claimed and the judgment must be reversed.*"

This court has thus declared that if any personal rights, protected and guaranteed by the first eight amendments of the Constitution of the United States, are of such a character that they cannot be denied without violating "those fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions", such rights come within the due process provision of the Fourteenth Amendment.

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3. THE RIGHT TO BE SECURE AGAINST UNREASONABLE SEARCHES AND SEIZURES IS A FUNDAMENTAL PRINCIPLE OF LIBERTY AND JUSTICE PROTECTED BY THE FOURTEENTH AMENDMENT.

In every instance where this court has been called upon to construe the right to be secure from unreasonable search and seizure, as announced in the Fourth

Amendment, it has unequivocally held such right to be a fundamental principle of liberty and justice.

We quote from a few decisions of this court defining the high nature of the right and giving some of the history leading to its establishment.

In *Gouled v. United States,* 255 U. S. 298, 65 L. ed. 647, the Supreme Court, in discussing the Fourth and Fifth Amendments to the Federal Constitution said:

> "It would not be possible to add to the emphasis with which the framers of our Constitution and this court (citing cases) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two amendments. The effect of the decisions cited is that *such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundmental rights of the individual citizen*—the right, to trial by jury, to the writ of habeas corpus and to due process of law. It has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly overzealous executive officers."

In *Byars v. United States,* 273 U. S. 28, 33, 71 L. ed. 520, 524, it is said:

> "The 4th Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and the colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right."

In the case of *Boyd v. United States,* 116 U. S. 616, 29 L. ed. 746, the court devotes many pages to the history that led up to the Fourth Amendment to the Constitution of the United States and deals at length with the decision of Lord Camden in the case of *Entick v. Carrington* wherein the holding was first made that officials could not unlawfully enter an Englishman's house and take therefrom any books, papers or effects or use them thereafter for the purpose of prosecuting the home owner. The decision is quoted from at length and Mr. Justice Bradley, speaking for the court, said that the decision of Lord Camden "was welcomed and applauded by the lovers of liberty in the colonies as well as in the mother country" and that it was regarded "as one of the permanent monuments of the British Constitution".

The court then points out that the rules laid down by Lord Camden were in the minds of the framers of our Constitution at the time of the adoption of the Fourth Amendment, and, at page 630 of the reported case, referring to the importance of the rights so secured said:

"The principles laid down in this opinion *affect the very essence of constitutional liberty and security.* They reach further than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions, on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life. *It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense;* it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. *Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment.* In this regard the Fourth and Fifth Amendments run almost into each other."

At page 633, this court dwelt upon the evil results that would follow from giving any other interpretation to the Fourth Amendment, and in doing so said:

"We have already noticed the intimate relation between the two Amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in

a criminal case to be a witness against himself', which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment."

In the more recent case of *Go-Bart Importing Co. v. United States*, 282 U. S. 344, 75 L. ed. 374, 382, the foregoing principles were reaffirmed by the Supreme Court:

"The first clause of the 4th Amendment declares: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated.' It is general and forbids every search that is unreasonable; *it protects all, those suspected or known to be offenders as well as the innocent, and unquestionably extends to the premises where the search was made and the papers taken.* Gouled v. United States, 255 U. S. 298, 307, 65 L. ed. 647, 651, 41 S. Ct. 261. The second clause declares, 'and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized'. This prevents the issue of warrants on loose, vague or doubtful bases of fact. It emphasizes the purpose to protect against all general searches. *Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty. They are denounced in the constitutions or statutes of every state in the Union.* Agnello v. United States, 269 U. S. 20, 33, 70 L. ed. 145, 149, 51 A.L.R. 409, 46 S. Ct. 4. *The need of protection against them is attested alike by history and present conditions. The Amend-*

ment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted."

"General searches have long been deemed to violate fundamental rights. It is plain that the Amendment forbids them. In Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, Mr. Justice Bradley, writing for the court, said (p. 624): 'In order to ascertain the nature of the proceedings intended by the 4th Amendment to the Constitution under the terms "unreasonable searches and seizures", it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England. The practice had obtained in the colonies of issuing writs of assistance to revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced "the worse instrument of arbitrary power, the most destructive of English liberty, that ever was found in an English law book"; since they placed "the liberty of every man in the hands of every petty officer".' And in Weeks v. United States, 232 U. S. 383, * * * Mr. Justice Day, writing for the court, said (p. 391): 'The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all

alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws'."

Marron v. United States, 275 U. S. 192, 195, 72 L. ed. 231, 236.

In *Weeks v. United States,* 232 U. S. 383, 391, 58 L. ed. 652, 655, it is said:

"In *Bram v. United States,* 168 U. S. 532, 42 L. ed. 568, 18 Sup. Ct. Rep. 183, 10 Am. Crim. Rep. 547, this court, in speaking by the present Chief Justice of Boyd's Case, dealing with the 4th and 5th Amendments, said (544):

'It was in that case demonstrated that both of these Amendments contemplated perpetuating, in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change.' "

Summarized the decisions of this court have pronounced the constitutional prohibition against unlawful search and seizure to be a right **"indispensible to the 'full enjoyment of personal security, personal liberty and private property' "** and that it is **"to be regarded as the very essence of constitutional liberty"** (*Gouled v. United States, supra*); that it is an **"indefeasible right of personal security, personal liberty and private property"** (*Boyd v. United States, supra*); that it is a **principle "of humanity and civil**

liberty" (*Weeks v. United States, supra*); and that a violation of such right is **"obnoxious to fundamental principles of liberty"** (*Go-Bart Importing Co. v. United States, supra*) and has **"long been deemed to violate fundamental rights"**. (*Marron v. United States, supra.*)

The foregoing clearly establishes that the right to be secure against unlawful search and seizure is brought within the purview of due process as contained in the Fourteenth Amendment.

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4. THE RIGHT TO BE SECURE AGAINST UNREASONABLE SEARCHES AND SEIZURES PROHIBITS THE USE AS EVIDENCE OF THE PROPERTY OBTAINED AND KNOWLEDGE GAINED THEREBY.

The majority opinion of the California Supreme Court attempts to draw a distinction between the unlawful search conducted by state officers and the use as evidence of property taken or knowledge acquired as the result of such unlawful search by stating:

> "In the determination of whether the prohibition against unreasonable searches and seizures is included within this concept, the unlawful search and seizure must be distinguished from the introduction in court of the evidence obtained as a result thereof. 'The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures' may be so fundamental as to make any unreasonable search and seizure by a public officer a violation of due process of law. It does not neces-

> sarily follow, however, that the use in a court of law of evidence thus obtained is so contrary to fundamental principles of liberty and justice as to constitute a denial of due process of law." (R. 383.)

The foregoing is directly contrary to the decisions of this court which, in every instance, have held that to acknowledge the right but to permit the use of evidence or information acquired in violation of the right is in effect to nullify the right itself.

In *Olmstead v. United States,* 277 U. S. 438, 463, 72 L. ed. 944, 950, this court said:

> "But in the Weeks Case, and those which followed, this court decided with great emphasis, and established as the law for the Federal courts, that *the protection of the 4th Amendment would be much impaired unless it was held that not only was the official violator of the rights under the Amendment subject to action at the suit of the injured defendant, but also that the evidence thereby obtained could not be received."*

Silverthorne Lumber Co. v. United States, 251 U. S. 382, 64 L. ed. 319, 24 A. L. R. 1426, was a case where an indictment had been brought against the two Silverthornes and they were arrested and detained in custody. While in custody a representative of the Federal Government, without a warrant, went to the office of the Silverthornes and took all the papers and records that were there. A motion was made for the return of these papers. The Government had made copies thereof. The court ordered

the originals returned to the defendant, and new indictments were found by the grand jury based upon the evidence illegally obtained. *This court held that not only were the Silverthornes entitled to the return of their original papers but that the Government could not use any information thereby obtained either at the trial or for the purpose of procuring new indictments,* and said:

> "The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession; but not any advantages that the government can gain over the object of its pursuit by doing the forbidden act. Weeks v. United States, 232 U. S. 383, 58 L. ed. 652, L. R. A. 1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1117, to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. *In our opinion such is not the law. It reduces the 4th Amendment to a form of words.* 232 U. S. 393. *The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all.* Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent

source they may be proved like any others, but *the knowledge gained by the government's own wrong cannot be used by it in the way proposed.*"

In *Weeks v. United States, supra,* we find a set of facts paralleling those in the case at bar, and in dealing with the use of evidence acquired by an unlawful search and seizure this court said:

> "The case in the aspect in which we are dealing with it involves the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority, by a United States marshal holding no warrant for his arrest and none for the search of his premises. The accused, without awaiting his trial, made timely application to the court for an order for the return of these letters, as well as other property. This application was denied, the letters retained and put in evidence, after a further application at the beginning of the trial, both applications asserting the rights of the accused under the 4th and 5th Amendments to the Constitution. *If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.*"

Byars v. United States, 273 U. S. 28, 71 L. ed. 520, 522, is a reaffirmation of the doctrine:

> "Nor is it material that the search was successful in revealing evidence of a violation of a federal statute. A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and the doctrine has never been tolerated by this Court, *nor can it be tolerated under our constitutional system, that evidences of crime discovered by a federal officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed.*"

Thus, the right to be immune from an unlawful search and seizure by the state includes the right not to have used against one, as evidence in a criminal case, property or information acquired by the state while conducting such unlawful search and making such unlawful seizure.

In every instance this court has condemned *the use* by a state of evidence acquired in a manner proscribed by the Constitution.

In *Chambers v. Florida, supra,* the Fourteenth Amendment was deemed to be violated when the state used a confession improperly obtained. This court's language follows:

> "However, *use by a State* of an improperly obtained confession may constitute a denial of due process of law as guaranteed in the Fourteenth Amendment. Since petitioners have seasonably asserted the right under the Federal Constitution *to have their guilt or innocence of a capital crime determined without reliance upon confessions obtained by means proscribed by the due process*

clause of the Fourteenth Amendment, we must determine independently whether petitioners' confessions were so obtained, by review of the facts upon which that issue necessarily turns."

In *Mooney v. Holohan, supra,* the court held that *the use* by a state of known perjured testimony as evidence violated the due process clause. *Brown v. Mississippi, supra, Lisenba v. California, supra,* and all other cases dealing with confessions extorted by force, violence or intimidation, held convictions, *based upon their use,* void as lacking due process of law.

It is *the use* by a state of evidence acquired in a manner proscribed by the Constitution that constitutes the taking of life, liberty or property without due process of law.

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5. NO DISTINCTION EXISTS BETWEEN THE USE OF CONFESSIONS OBTAINED IN VIOLATION OF THE CONSTITUTION AND THE USE OF EVIDENCE ACQUIRED BY AN UNREASONABLE SEARCH AND SEIZURE.

The majority opinion of the California Supreme Court acknowledges that the use by a state of a confession procured by force, violence or intimidation constitutes a denial of due process of law. This opinion, however, attempts to draw a distinction between such unlawfully procured confessions and evidence acquired by an unlawful search and seizure by holding that the manner of procuring the confession has been declared by this court to be obnoxious to the Fourteenth Amendment because "a confession obtained by coercion or torture is so unreliable that its

use violates all concepts of fairness and justice" while the use of evidence "obtained through an illegal search and seizure does not violate due process of law for it does not affect the fairness or impartiality of the trial." (R. 384.)

The foregoing reasoning of the California court is fallacious and directly contrary to the doctrine announced by this court.

In the recent case of *Lisenba v. California, supra,* it is expressly stated that the rule as to confessions *was not based on the fact that they may be false.* This court's language therein is as follows:

> "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false."

In *Marron v. United States,* 275 U. S. 192, 196, 72 L. ed. 231, 237, this court has placed convictions obtained by means of unlawful seizures and forced confessions on identically the same footing:

> "The tendency of those who execute the criminal laws of the country to obtain conviction *by means of unlawful seizures and enforced confessions* * * * should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."

As demonstrative of the fallacy of the respondent court's decision and as showing that there is no distinction, in the constitutional right involved, between

enforced confessions and property obtained by unlawful seizures we present the two following hypothetical cases:

Case 1. A man has committed a crime. A state officer points a gun at him and under threat of shooting him to death forces him to sign a confession of guilt. There is no other evidence presented in the case except proof of the *corpus delicti* and the confession. The man is convicted.

Under the interpretation of the Fourteenth Amendment, as accepted by the majority opinion of respondent court, the use of such confession, procured under such circumstances, is a violation of the Fourteenth Amendment and necessitates a reversal of the conviction.

Case 2. A man has committed a crime. A state officer at the point of a gun enters his home and under threat of shooting him to death compels him to deliver over incriminating evidence. There is no other evidence presented in the case except proof of the *corpus delicti* and the incriminating evidence procured by the state officer under the foregoing circumstances. The man is convicted.

As the Fourteenth Amendment excludes the use of the confession in Case 1 it must equally exclude the use of the incriminating evidence in Case 2. In each instance the evidence has been procured in identically the same manner. Yet, under the interpretation of the majority opinion, the incriminating evidence would be admissible in Case 2 although the confession in

Case 1 would be inadmissible. No distinction exists between the two cases.

The reasoning pursued by this court in *Lisenba v. California, supra,* demonstrates that a state cannot use any evidence procured in a manner condemned by the Constitution, whether it be an enforced confession or evidence acquired by an unlawful search and seizure. We quote in part from the *Lisenba* case.

> "To extort testimony from a defendant by physical torture in the very presence of the trial tribunal is not due process. *The case stands no better if torture induces an extrajudicial confession which is used as evidence in the courtroom.*
>
> A trial dominated by mob violence in the courtroom is not such as due process demands. *The case can stand no better if mob violence anterior to the trial is the inducing cause of the defendant's alleged confession.* * * *
>
> The concept of due process would void a trial in which, by threats or promises in the presence of court and jury, a defendant was induced to testify against himself. *The case can stand no better if, by resort to the same means, the defendant is induced to confess and his confession is given in evidence.*"

Applying the foregoing reasoning to the case at bar, it must be held that if during the trial Chierotti in the courtroom was compelled by the state to produce the bag and its contents, such action would constitute a denial of due process of law and render his conviction void. The case can stand no better because, anterior to trial, the state procured from

Chierotti the bag and its contents in a manner condemned by the Constitution and then used it as evidence against him in the trial.

As no distinction exists between the use of evidence procured by unlawful search and seizure and the use of enforced confessions all doctrines and decisions which have held convictions void which were based on forced confessions must equally apply to the instant case where the convictions were based on evidence acquired by unlawful search and seizure.

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6. AS THE CONVICTION OF CHIEROTTI IS VOID THE CONVICTION OF GONZALES MUST BE REVERSED.

Throughout this brief the constitutional right claimed pertains solely to petitioner Chierotti and, it may be argued, that petitioner Gonzales is not entitled to avail himself of another's constitutional right.

Under the law a reversal of the conviction of Chierotti necessitates a reversal of the conviction of Gonzales.

Where only two persons are charged and convicted of a conspiracy, a reversal of the cause as to one necessitates a reversal of the cause as to the other. This is based on the legal proposition that the crime of conspiracy is indivisible and unless it be established that each of two persons was a part of the same conspiracy there has been a total failure of proof.

In *Cofer v. United States,* 37 Fed. (2d) 677, *four men were convicted* of a criminal conspiracy and ap-

pealed. It developed that *as to three of the men evidence had been admitted against them which had been procured by an unlawful search and seizure.* The court held that the cause had to be reversed as to the three for such reason and also held that this made it mandatory to reverse the cause as to the fourth. Its language, on page 680, is as follows:

> "The remaining appellant, Fred Hamilton, was not searched, nor was any of his property seized, and no question as to illegal evidence of that nature arises in his favor. The conspiracy was charged to have been between the four appellants and one Glen Davis, whose acquittal was directed by the District Judge. The conclusion we have reached as to the three appellants, together with the elimination of Glen Davis from the case, leaves the conviction of the appellant Fred Hamilton alone standing. *The rule in conspiracy cases is that, when the conviction of all the conspirators except one is reversed, the conviction of that one should also be reversed,* since, in conspiracy cases, at least two must be convicted or none."

In *Morrow v. United States,* 11 Fed. (2d) 256, 260, the Circuit Court of Appeals therein stated:

> "This error affected the substantial rights of defendant Greyson, necessitating a reversal of the case as to him, which carries a reversal as to the other defendant; this being a prosecution for conspiracy of Morrow and Greyson. Turinetti v. United States (C.C.A.), 2 F. (2d) 15."

In *Morrison v. California,* 291 U.S. 82, 93, 78 L. ed. 665, 672, two defendants were charged and convicted

of a conspiracy. This Court reversed this conviction, stating:

> "The conviction failing as to the one defendant must fail as to the other. Turinetti v. United States (C.C.A. 9th), 2 F. (2d) 15, supra; Williams v. United States (C.C.A. 4th), 282 Fed. 481, 484; Gebardi v. United States, supra."

CONCLUSION.

We believe that the foregoing conclusively demonstrates that the right to be secure from unlawful search and seizure is one of those fundamental principles of liberty and justice which a state cannot deny to a defendant under the due process clause of the Fourteenth Amendment. This right includes the right to have returned any property the state has acquired by an unlawful search and to have excluded from evidence such property together with any knowledge or information acquired by the state in conducting the unlawful search and seizure.

In the instant case the state relied on the bag and contents found in Chierotti's apartment as being the salient factor in establishing the conspiracy charged in the indictment. This physical evidence, having been acquired by the state in a manner proscribed by the Constitution, could not be relied on by the state to establish the charge as Chierotti, months before the trial, had invoked his constitutional right and demanded the return of the property to him and the exclusion of it from the evidence at the trial. Each

petitioner, throughout the trial, constantly objected to any evidence acquired as the result of the unlawful search and seizure. Before the California Supreme Court these constitutional questions were raised, argued, considered by that court and the claimed constitutional right denied to each of them. This constituted a denial of due process of law.

Dated, San Francisco, California,
July 27, 1942.

Respectfully submitted,
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